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No. 08-636

IN THE

# Supreme Court of the United States

GENERAL AUTO SERVICE STATION, AN ILLINOIS CORPORATION, F.A.Y. PROPERTIES, INC., AN ILLINOIS CORPORATION, AND COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, NOT INDIVIDUALLY BUT AS TRUSTEE UNDER TRUST AGREEMENT DATED DECEMBER 21, 1994 AND KNOWN AS TRUST # 27340, PETITIONERS

*v.*

CITY OF CHICAGO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF

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The City of Chicago grandfathers a limited class of non-conforming signs. It conditions this benefit upon an applicant having previously secured a sign permit under a facially unconstitutional law. Chicago declares that "it is rational for the City to penalize sign owners who [did] not comply with the [former] permitting requirements, *even if unconstitutional* ...." Response 25-26. Emphasis added. The implications of the Seventh Circuit's decision to uphold the First Amendment constitutionality of this regulatory scheme are far-reaching.

In 1995, petitioners' sign lessee applied for a permit. After securing zoning certification, the lessee sent a letter to the local alderman requesting City Council approval. The request went unanswered, and the application languished without a decision. *See* App. 5a. Chicago's City Council (comprised of the City's 50 aldermen) was under no time deadline to respond; and would not have been bound to follow any standards had it determined to act on the request. Not until 1998 did Chicago: (1) standardize the procedure by which proposed signs would be introduced before the City Council; (2) require the City Council to approve or disapprove permits based on specific content-neutral criteria; (3) require permits to be issued to applicants whose signs complied with the Code, unless the City Council issues an order of disapproval; and (4) establish a time frame within which both the City Council and Commissioner of Buildings would be required to take final action on sign permit applications. *Compare* section 14-40-120, as amended on 2/5/98, App. 114a-117a, with prior versions of said provision, App. 109a-113a, and with versions of the provision requiring a permit, App. 104a-105a.

If not specifically intended to redress constitutional infirmities, these 1998 amendments were prescribed to achieve at least some level of municipal accountability. In the decades preceding 1998, unchecked and unbridled discretion in the performance of duties reserved to Chicago aldermen, and other City officials, had facilitated bribery, extortion, and other breaches of the public trust:

> In Chicago ... more than 400 public officials and employees, including 18 aldermen or former aldermen, have been convicted over the past 20 years for soliciting and taking bribes, extortion, or embezzlement of public funds in connection with zoning, building permits, business licenses, liquor licenses or law enforcement .... Ben Joravsky, *By Chicago Standards, Rosty Looks Honest,* L.A. TIMES, Aug. 1, 1993, at M1; [Harlan] Draeger, *supra* note 52 [*A Crime Waive for Aldermen,* CHI. SUN-TIMES, Jan. 1, 1992, at 1]; Matt O'Connor, *Roti Fixed Zoning, His Lawyer Concedes,* CHI. TRIB., Jan. 13, 1993, at 6.

Bradley C. Karkkainen, *Zoning: A Reply to the Critics,* 10:1, J. Land Use & Envtl. Law, 1994, 1, 43 note 155.

Two more Chicago aldermen pled guilty to taking bribes in 1996, and another alderman was convicted of conspiracy and extortion in 1997. *Caught and Convicted,* CHI. SUN-TIMES, June 17, 1997, at 2; *A Quarter-Century of Corruption,* CHI. SUN-TIMES, Dec. 5, 1998, at 2. "These [Chicago] numbers ... are probably just the tip of the iceberg, since it is likely that not all bribe-takers are caught and convicted." Karkkainen, *supra* note 157, at 44; *see also* Leon M. Despres with

Kenan Heise, *Challenging the Daley Machine – A Chicago Alderman's Memoir*, 104 (Northwestern University Press, 2005) ("In my 20 years [1955-75] in the city council, I found corruption in the city council easy to suspect but hard to establish ....")[1]

Unbridled discretion in determining who may obtain a permit and display a sign threatens more than disfavored speech. It threatens fair and open access to an entire medium of expression, enabling rogue officials to reward speakers willing to buy in, and silence others unable or unwilling to bargain for approval. The 1998 Code amendments that sought to abolish the unbridled discretion reflected in Chicago's sign permitting process failed to redress a significant and continuing infirmity within the City's permitting scheme: *Chicago determines which lawfully established but now nonconforming signs (such as petitioners' off-premises advertising sign) will be grandfathered based on one single and constitutionally defective factor - whether*

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[1] Despres maintained that at least half of his colleagues in the Chicago City Council would "sell" driveway permits issued under their *de facto* authority, given their control of City Council access on matters pertaining to their respective wards:

> They had no right to sell driveway permits, but they did so, and the prices went from a few hundred dollars for a backyard garage to thousands of dollars for a hotel. If you wanted to open a multimillion-dollar retail store and needed driveway permits for access, your alderman could hold you up, and frequently did.

Despres, *supra* at 34-35. Whether or not Despres overestimated the breadth of this particular permitting abuse, the underlying discretion to delay would have enabled Chicago aldermen, if they so chose, to taint fair access to permits.

*the sign owner or operator successfully secured a sign permit pursuant to the pre-amendment Code.* This carries forward the unconstitutionality of the pre-amendment Code, and penalizes a person's inability or disinclination to do whatever might have been necessary to secure a permit under a law that was devoid of any narrow, objective and definite standards.

Chicago thus conditions the benefit of a grandfathered sign upon having forborne the exercise of the constitutional right reiterated by this Court in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969): freedom to ignore such a defective licensing or permitting requirement, and "engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151. The Seventh Circuit's decision to sanction a scheme in which the government has avowed the authority "to penalize" the exercise of this constitutional right makes the decision below a compelling case for review.

## I. The Decision Below Conflicts with Rutan and Perry.

In its decision below, the Seventh Circuit found the defects in Chicago's sign permitting scheme to be of limited constitutional relevance: "[T]he question for us is whether, by virtue of the defects in the permitting scheme as it existed [prior to 1998], Heerey and GASS also obtained a protected property interest in the sign as a lawful, non-conforming use, just as if Heerey had obtained a permit ...." App. 22a. Determining that no such property interest had been obtained, the Seventh Circuit found no violation of any due process property right. *Id.* Yet, under *Rutan v. Republican Party of*

*Illinois*, 497 U.S. 62 (1990) and *Perry v. Sindermann*, 408 U.S. 593 (1972), the constitutional "question" cannot be so constrained when the exercise of a constitutional right is at issue:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

*Rutan*, 497 U.S. at 72, quoting *Perry*, 408 U.S. at 597.

So even if no *property right* will lie, the question remains as to whether Chicago denied *the benefit* of a grandfathered sign on a basis that infringes upon free speech. Chicago denied petitioners the benefit of a grandfathered sign precisely because of the exercise of a First Amendment right: the freedom to ignore the City's unconstitutional sign permitting "requirement." Such governmental action directly infringed upon petitioners' constitutional rights; and the Seventh Circuit's decision to uphold the dismissal of petitioners' First Amendment claim constitutes a significant departure from the Court's decisions in *Rutan* and *Perry*.

Chicago asserts that although petitioners[2] "challenged the former version of the permit requirement as an unconstitutional prior restraint in both courts below, [they] only [did so] in the context of their substantive due process claims, not their First Amendment claim." Response 21. Chicago thus claims waiver; but waiver cannot stand. Indeed, the very reason the district court dismissed petitioners' First Amendment claim was because it believed the claim to be duplicative: "nothing more than a restatement of [petitioners'] arguments that the City's refusal to grandfather [their] sign deprives [them] of [substantive] due process." App. 84a-85a. As the district court otherwise considered and rejected petitioners' argument that Chicago's former permitting requirement constituted an invalid prior restraint of speech, violative of the First Amendment (*see* App. 42a-45a), Chicago's circuitous claim of waiver is unavailing.

Chicago further maintains that the First Amendment argument now asserted was only made in petitioners' reply brief to the Seventh Circuit; and that although the argument was set forth in petitioners' opening brief to that court, it was only within the context of due process. Chicago again claims waiver (*see* Response 8-9); but again the defense will not stand. Arguments from the due process portion of petitioners' opening brief—addressing facial violations of the First Amendment—were expressly incorporated into that

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[2] Chicago states that "petitioners" participated in administrative and state court proceedings relating to the sign at issue (*see* Response 4-5); in fact, petitioners sought but were denied the right to intervene in those proceedings prior to their filing the instant federal action. *See* App. 8a-9a.

brief's First Amendment argument by reference to "*supra*." *See* Petition 18. Arguments fully pressed in each court below cannot be deemed waived.[3]

## II. The Conflict with Outdoor Media Is Intolerable.

In *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007), the Ninth Circuit addressed the same significant issue as in the case below: a First Amendment challenge to a billboard regulation, given the apparent absence of a property right in the billboard's display. Relying expressly on *Rutan*, the Ninth Circuit reversed a district court dismissal of a First Amendment challenge to a billboard regulation because the dismissal had been predicated upon the failure to show any property right in the billboard's display. *Id.* at 903.

In the case below, the Seventh Circuit took a conflicting and outcome determinative approach. Having found that no property right could vest by virtue of the sign's lawful display without a "required" permit, even if that requirement had been unconstitutional (*see* App. 22a), the Seventh Circuit upheld the dismissal of petitioners' First Amendment claim. *See* App. 29a-32a. With no property right stemming from the sign's prior use, the Seventh Circuit determined that Chicago's grandfather provision for

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[3] In any event, this Court's "traditional rule is 'that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited by the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (*citing Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

signs could only be scrutinized in isolation, (i) irrespective of the unconstitutional permitting requirement that the grandfather provision expressly invokes, and (ii) irrespective of the commercial speech regulation that the grandfather provision sometimes exempts. The outcome of the Seventh Circuit's First Amendment decision, therefore, was predicated upon its express determination that petitioners held no property right in the sign's display. *See id.* The fact that the circuit courts have split over the breadth of a fundamental constitutional right presents another reason why this case is ripe for review.

Chicago cites *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) and *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) for the proposition that this Court does not ordinarily decide in the first instance matters not decided below. Chicago claims that the constitutionality of its former sign permitting requirement was not decided in either court below. *See* Response 17-18. Yet, the district court both considered and ruled upon this underlying issue, determining that Chicago's sign permitting requirement did not "implicate First Amendment concerns ...." App. 42a.[4]

The Seventh Circuit also considered the issue. It acknowledged the permitting scheme's lack of time deadlines, and lack of standards limiting the discretion of Chicago permitting officials. The Seventh Circuit

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[4] Although Chicago characterizes the district court determination as a "refus[al] to consider the facial challenge..." (*see* Response 17), that assertion is belied by the district court's express rejection of the challenge. *See* App. 42a-45a.

also outlined the relevant case law showing that standardless permitting schemes cannot survive First Amendment scrutiny. *See* App. 20a-21a. Only then did the Seventh Circuit determine that it would "accept without deciding that the features of the City's [former] permitting scheme ... indeed rendered the permit requirement incompatible with the First Amendment, such that [petitioners' predecessor in interest] was entitled to ignore it." App. 22a. The Seventh Circuit's determination that any such unconstitutionality holds no bearing on petitioners' First Amendment claim shows that *Cooper* and *Cutter* cannot justify denial of review by this Court.

## III. The Conflict with City of Cambridge Is Intolerable.

The Seventh Circuit's refusal to address the commercial speech restriction at issue, *in conjunction with its grandfathering exemption*, represents a fundamental departure from how this Court has consistently analyzed permissible speech regulation. It has also created an intolerable conflict with the First Circuit's decision in *Ackerley Communications of Massachusetts v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), which held firm to the Court's analytical framework when specifically presented with a sign restriction *modified by* a separate grandfathering exemption.

Indeed, the Court has consistently assessed the permissible bounds of a given speech regulation within the context of that regulation's applicable exemptions. As the Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994):

> an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate. ..." *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* 447 U.S. 530, 538 (1980).
>
> ...
>
> Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy [because] they may diminish the credibility of the government's rationale for restricting speech in the first place. *See, e.g., Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993).

*Gilleo*, 512 U.S. at 51-54. The Seventh Circuit's abandonment of this integrated approach has created an intolerable conflict regarding the proper analytical standard for determining constitutionally permissible restraints on free speech.

## IV. The Asserted "Waiver" of a Time, Place and Manner Argument Is Illusory.

When government imposes a permitting requirement on free speech (as Chicago has done with its grandfather provision for nonconforming signs), this

Court has repeatedly determined that the constitutionality of such a requirement turns on whether the government also provides for "narrow, objective, and definite standards to guide the licensing authority." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citing *Shuttlesworth*, 394 U.S. at 150-151); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988) ("[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." Emphasis in original.)

In the case below, petitioners cited *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) and *Forsyth County*, 505 U.S. at 131 in support of the proposition that content-neutral time, place and manner permitting schemes are unconstitutional where, as in the instant case, "the licensing official enjoy[ed] unduly broad discretion in determining whether to grant or deny a permit ...." GASS Amended Br. at 40 (quoting *Thomas*, 534 U.S. at 323).

Although the petitioners thus analyzed Chicago's permitting scheme as an invalid time, place and manner restriction, the Seventh Circuit determined that the First Amendment claim must fall because petitioners failed to analyze Chicago's grandfather provision, *in isolation*, as a time, place and manner restriction. This underscores the extraordinary departure the Seventh Circuit's decision represents from this Court's decisions concerning the analytical framework appropriate for determining the constitutionality of speech restrictions,

and provides another sound basis for review by this Court.

## V. The Standing and Limitations Defenses Lack Merit.

Chicago acknowledges that the district court interpreted the Zoning Ordinance in effect at the time the sign went up as authorizing its legality; and that "[t]he City and the Seventh Circuit ... accepted that [determination] for purposes of the [Seventh Circuit] appeal. *Id.* at 4a." Response 2. Chicago, however, now asserts that this district court determination (*see* Appendix 66a-68a), based on a mixed question of Illinois law and fact, was incorrect; and that petitioners lack standing because their sign was never legal. *See* Response 12-14. The position is unavailing. *See Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("[T]his Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

Chicago's limitations argument is likewise unavailing. In moving the district court to dismiss the First Amendment count of petitioners' first amended complaint, Chicago attacked only the merits of the First Amendment claim, and asserted no statute of limitations defense. *See* Record 68. The defense of limitations, therefore, is waived. *See Wagner v. Fawcett Publications*, 307 F.2d 409, 412 (7th Cir. 1962) (refusing to entertain statute of limitations as a basis for upholding dismissal since, "by its motion to dismiss, [defendant] attacked the complaint on the merits, thus waiving [on appeal] the affirmative defense of the

statute of limitations ...."). Moreover, the Seventh Circuit otherwise found Chicago's limitations defense—*actually asserted in response to petitioners' substantive due process claims*—to be of dubious validity, and so chose to address the merits of substantive due process. *See* App. 17a-19a.

## CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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